

1 THE HONORABLE THOMAS S. ZILLY  
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6 U.S. DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON

8 STRIKE 3 HOLDINGS, LLC, a Delaware  
9 corporation,

10 Plaintiff,

11 vs.

12 JOHN DOE, subscriber assigned IP  
13 address 73.225.38.130,

14 Defendant.

15 JOHN DOE subscriber assigned IP  
16 address 73.225.38.130,

17 Counterclaimant,

18 vs.

19 STRIKE 3 HOLDINGS, LLC,

20 Counterdefendant.

21 NO. 2:17-cv-01731-TSZ

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DEFENDANT'S RESPONSE TO  
PLAINTIFF'S MOTION TO COMPEL  
RESPONSES FROM DEFENDANT  
TO QUESTIONS POSED AND  
OBJECTED TO APRIL 9, 2019  
DEPOSITION

I. INTRODUCTION

Strike 3 has failed to meet its burden of establishing that good cause justifies its request to depose Doe a second time in order to obtain answers to five discrete questions. Strike 3 has also failed to identify the nexus between the questions and any claims and defenses in the case.

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION  
TO COMPEL RESPONSES FROM DEFENDANT TO  
QUESTIONS POSED AND OBJECTED TO APRIL 9, 2019  
DEPOSITION - 1

CASE No. 2:17-cv-01731-TSZ

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1 Strike 3 has further failed to explain why Doe's offer to provide written answers to many of the  
 2 questions is unsatisfactory. Doe respectfully requests that the Court deny Strike 3's motion to  
 3 compel and award Doe the fees he incurred responding to the motion.

## 4 II. STATEMENT OF FACTS

5 During Doe's deposition, Strike 3's attorneys asked a series of questions that infringed  
 6 on the attorney-client privilege. ECF 126-1 at 30:9-15. Strike 3 took the position that the  
 7 questions were permissible. *Id.*, 31:3-6. Doe's counsel asked for case law supporting Strike 3's  
 8 position. *Id.*, 31:1-2. Strike 3 declined to provide any authority. After a break, Doe's counsel  
 9 acknowledged Strike 3's entitlement to "explore damages," but expressed concern about "a  
 10 waiver of the attorney-client privilege" and urged Strike 3's counsel to work together "to figure  
 11 out a mechanism for [Strike 3 to explore damages] that doesn't involve my client waiving his  
 12 attorney-client privilege...." *Id.*, 32:5-15.

13 Doe's counsel suggested that permissible questions would include: (1) Have you paid  
 14 anything? (2) How much have you paid? (3) Are you obligated to pay? and (4) Are you  
 15 obligated for costs? ECF 126-1 at 33:6-9. Strike 3's counsel agreed, responding: "Okay. I'd  
 16 love the answer to all of those. They were great. I might even have the reporter read them back  
 17 they were so good." *Id.*, 33:10-13. Strike 3's counsel then went on to ask nearly identical  
 18 questions, which Doe answered:

19 Q. Are you obligated to pay costs in this lawsuit?

20 A. Yes, I am.

21 Q. Okay. And have you to date paid costs?

22 A. No.

23 Q. Have you paid anything in attorney's fees to date on this matter?

24 A. No.

25 Q. Do you know who has -- do you know if anyone has paid your attorneys for their  
 26 services for this case?

27 DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION  
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 QUESTIONS POSED AND OBJECTED TO APRIL 9, 2019  
 DEPOSITION - 2

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1 A. No. No.

2 *Id.*, 33:14-25.

3 After Strike 3's counsel had completed his line of questioning, he announced: "Okay.  
4 That's all I have." See Declaration of Adrienne D. McEntee in Support of Defendant's  
5 Response to Plaintiff's Motion to Compel Responses from Defendant ("McEntee Decl."),  
6 Exh. 1. At no point did Strike 3's counsel suggest that the deposition should remain open, or  
7 otherwise subject to continuation pending the resolution of the questions of which Strike 3 now  
8 complains. *Id.*, ¶ 3.

9 Nonetheless, on May 20th, Doe's counsel conferred with Strike 3's counsel in a good  
10 faith attempt to resolve Strike 3's complaints. McEntee Decl. ¶ 4. Specifically, Doe offered to  
11 provide Strike 3 a copy of Doe's fee agreement with counsel, which Strike 3 requested for the  
12 first time a month after Doe's deposition. *Id.*, ¶ 7. Doe also offered to provide answers to the  
13 written questions: (i) Are you aware that the Court entered an order that Comcast was not to  
14 give your name and address to Strike 3 but was simply to give it to the court? (ii) When did you  
15 become aware of this? and (iii) When did you find out your identity and your address had been  
16 provided to Strike 3? *Id.*, Exh. 2.

17 Strike 3 declined Doe's offer. McEntee Decl., ¶ 6. Instead, Strike 3 insists it should be  
18 allowed to depose Doe a second time.

19 **III. STATEMENT OF ISSUES**

20 1. Should Strike 3 be permitted to depose Doe a second time seeking testimony  
21 that infringes on the attorney-client privilege or that is irrelevant and/or disproportionate to the  
22 needs of the case?

23 2. Should Doe be awarded the attorneys' fees he incurred responding to Strike 3's  
24 motion when Strike 3 could have avoided motion practice altogether?

#### **IV. AUTHORITY AND ARGUMENT**

**A. Second depositions of the same witness are disfavored.**

Rule 30(a)(2)(A)(ii) requires a party to obtain leave of court before deposing a person that has already given a deposition in the case. A party seeking to take a second deposition of the same witness must establish that good cause or a specific need entitles the party to take another deposition. *See, e.g., Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, No. CIV 08CV335 IEG NLS, 2009 WL 861733, at \*4 (S.D. Cal. Mar. 25, 2009) (stating that, “[a]bsent a showing of good cause, generally the court will not require a witness to appear for another deposition”); *State Farm Mut. Auto. Ins. Co. v. New Horizon, Inc.*, 254 F.R.D. 227, 235 (E.D. Pa. 2008) (serial depositions of an individual are disfavored because of the cost and burden, and because they “provide[ ] the deposing party with an unfair strategic advantage, offering it multiple bites at the apple, each time with better information than the last”); *Dixon v. Certainteed Corp.*, 164 F.R.D. 685, 690 (D. Kan. 1996) (stating that, “[a]bsent some showing of a need or good reason for doing so, ‘the court will generally not require a deponent to appear for a second deposition’ ”); *Graebner v. James River Corp.*, 130 F.R.D. 440, 441 (N.D. Cal. 1989) (noting that “repeat depositions are disfavored, except in certain circumstances,” e.g., “long passage of time with new evidence, new theories added to the complaint, etc.”)).

Similarly, Rule 26(b)(1) permits discovery of nonprivileged matters that are relevant to any party's claims or defenses, so long as the discovery is "proportional to the needs of the case." Indeed, the Court may limit discovery where "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C)(i).

As discussed below, Strike 3 has not shown that a second deposition is proportional to the needs of the case, let alone established good cause for its request. Strike 3's motion is particularly problematic given Doe's willingness to provide written responses to specific questions, despite their tenuous connection to any claim or defense.

1           **B. Question 1 infringes on the attorney-client privilege.**

2           Strike 3 insists that it is entitled to an answer to the question: “And who referred you to  
 3 the Terrell Marshall firm?” Doe respectfully disagrees. The answer to that question requires  
 4 Doe to reveal communications with his attorneys. Moreover, the answer to the question has no  
 5 bearing on the parties’ claims or defenses. Strike 3 states emphatically that knowing who  
 6 referred Doe to the Terrell Marshall firm “is relevant to Plaintiff’s affirmative defense of abuse  
 7 of process,” but aside from parroting language from its affirmative defense, makes no effort to  
 8 describe why. Nor does Strike 3 provide any explanation for how the identity of the person who  
 9 referred Doe to the law firm would be relevant to Strike 3’s allegation that Doe’s counterclaims  
 10 are the result of a “deliberate misconstruing of the early discovery in this case.” ECF 126 at  
 11 7:9. Strike 3’s position is particularly puzzling given that Terrell Marshall has never before  
 12 appeared in copyright litigation involving an abuse of process claim. McEntee Decl. ¶ 8.  
 13 Because information from Doe regarding who referred him to Terrell Marshall has no  
 14 connection to the claims and defenses in this case, the motion should be denied.

15           **C. Doe has offered to answer Questions 3 and 4 even though they are not relevant to  
 16 the claims and defenses and are disproportional to the needs of the case.**

17           Questions 3 and 4, like Question 1, have no bearing on the issues in this case. In  
 18 asserting that the answers to whether Doe’s identity had been provided to Strike 3, and when,  
 19 could “raise[] serious questions about proximate cause,” Strike 3 misunderstands Doe’s abuse  
 20 of process counterclaim. The counterclaim does not turn on what Strike 3 did, or did not do,  
 21 with Doe’s information. The crux of Doe’s abuse of process counterclaim is that Strike 3 used  
 22 this lawsuit as a springboard to seek Doe’s identity, with the improper goal of embarrassing  
 23 him into a settlement. *See, generally*, ECF 79. And Strike 3 supported its motion for early  
 24 discovery with declarations that contained significant omissions and inaccuracies. *Id.* When  
 25 and how Doe learned that Strike 3 knew his identity are not defenses to these allegations.

26           Setting these problems aside, Doe agreed to provide written answers to questions that  
 27 go to the heart of what Strike 3 seeks. Specifically, Doe agreed to provide answers to:

DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION  
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 DEPOSITION - 5

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- 1     • Are you aware that the Court entered an order that Comcast was not to give your
- 2         name and address to Strike 3 but was simply to give it to the court?
- 3     • When did you become aware of this? and
- 4     • When did you find out your identity and your address had been provided to
- 5         Strike 3?

6     McEntee Decl., Exh. 2.

7             It remains unclear to Doe why Strike 3 declined this offer. In any event, because Strike  
 8     3 has not established good cause to take a second deposition of Doe regarding these questions,  
 9     its motion should be denied.

10   **D. Any dispute concerning Questions 2 and 5 is moot.**

11             Finally, Strike 3 complains that it was not allowed to hear Doe's answer to Question 2:  
 12     "How much did you pay Mr. Edmondson to retain him to take this case?" In actuality, Doe  
 13     provided Strike 3 with the very answer, albeit in response to a differently worded question. The  
 14     excerpt Strike 3 used to support its motion includes the question: "Did you pay Mr. Edmondson  
 15     up front to represent you in this case?" Doe's Dep. 30:17-18. In response, Doe answered: "No."  
 16     *Id.*, 30: 19. Doe's answer is the same, whether in response to Question 2 or to Strike 3's  
 17     separate, but nearly identical question. Therefore, any dispute as to Question 2 is moot.

18             The dispute surrounding Question 5 is also moot. Strike 3 complains that Doe did not  
 19     answer the question: "Do you have a deal with your attorneys that allowed them to go seek  
 20     attorney's fees from Strike 3 so that you don't ever have to pay them?" But Doe has already  
 21     agreed to provide a copy of his fee agreement, which will address the terms of the engagement.  
 22     McEntee Decl. ¶ 5. Notably, Strike 3 waited a month *after* Doe's deposition to request the fee  
 23     agreement. *Id.*, ¶ 7. Doe's responses are due on June 6th. *Id.*

24             Because Doe has already provided the answers requested, or will timely provide  
 25     responsive documents in response to Strike 3's recent discovery requests, Strike 3's motion  
 26     should be denied.

27     DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION  
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**E. The Court should award Doe fees for having to respond to Strike 3's motion.**

Because Strike 3's motion to compel should be denied, Doe is entitled to his reasonable fees and costs incurred in responding to this motion pursuant to Rule 37(a)(5)(B). Simply put, Strike 3's motion is not substantially justified because Strike 3 has not shown good cause to depose Doe, a person who has already given a deposition in the case, a second time. Doe's attorneys incurred \$1,500 in attorneys' fees and costs in relation to Strike 3's motion. McEntee Decl. ¶ 9.

## V. CONCLUSION

Based on the foregoing, Doe respectfully requests that the Court deny Strike 3's motion and award his reasonable attorneys' fees in relation to responding to the motion.

RESPECTFULLY SUBMITTED AND DATED this 4th day of June, 2019.

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**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION  
TO COMPEL RESPONSES FROM DEFENDANT TO  
QUESTIONS POSED AND OBJECTED TO APRIL 9, 2019  
DEPOSITION - 7**

**DEFINITION -**  
CASE NO. 2:17-CV-01731-TSZ

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**CERTIFICATE OF SERVICE**

I, Adrienne D. McEntee, hereby certify that on June 4, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION  
TO COMPEL RESPONSES FROM DEFENDANT TO  
QUESTIONS POSED AND OBJECTED TO APRIL 9, 2019  
DEPOSITION - 8

DEPOSITION - 8  
CASE NO. 2:17-cv-01731-TSZ

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14 DATED this 4th day of June, 2019.

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23 DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION  
24 TO COMPEL RESPONSES FROM DEFENDANT TO  
25 QUESTIONS POSED AND OBJECTED TO APRIL 9, 2019  
26 DEPOSITION - 9

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